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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ELIZABETH SEPULVEDA-HUTH Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and CITY OF VISALIA, Respondents.	F045796 (WCAB FRE 0167354) OPINION

ORIGINAL PROCEEDING; petition for writ of review. Joy L. Kirkorian, Administrative Law Judge.

Thomas L. Tusan, for Petitioner.

Dooley & Herr, Leonard C. Herr and Kris B. Pedersen, for Respondent City of Visalia.

No appearance for Respondent Workers' Compensation Appeals Board.

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Is a person entitled to the protections afforded by Labor Code section 132a[1] for discrimination that is alleged to have taken place during a time when the person is not an

[1] Further statutory references are to the Labor Code.

SEE DISSENTING OPINION

employee of the allegedly discriminatory employer? In other words, is a *former* employee an employee within the meaning of the statute? Elizabeth Sepulveda-Huth filed a writ petition with this court seeking an answer to this question. We granted Sepulveda-Huth's petition for writ of review, and conclude "former employees" are not "employees" within the meaning of section 132a. Accordingly, we uphold the decision of the Workers' Compensation Appeals Board (WCAB).

PROCEDURAL AND FACTUAL HISTORY

Sepulveda-Huth voluntarily resigned from her position as a police officer with the City of Visalia (Visalia) effective August 9, 1995. In January of 1996, Sepulveda-Huth and three other female former officers filed a civil lawsuit against Visalia for sexual harassment, gender discrimination, racial discrimination, retaliation and constructive discharge in violation of the California Fair Employment and Housing Act. (Gov. Code, § 12900 et. seq.)

In September of 1997, two years after her resignation, Sepulveda-Huth requested a hearing before the WCAB alleging injury to her psyche due to "cumulative stress of [her] work environment." Sepulveda-Huth also applied for disability retirement benefits through the California Public Employees Retirement System (PERS) in October of 1997, based on the same alleged disability arising from her work environment. PERS acknowledged receipt of the application and forwarded the application to Visalia in May of 1998. Pursuant to Government Code section 21157, Visalia was required to make a determination regarding Sepulveda-Huth's eligibility for disability retirement within six months of receipt of the application.[2] Between September 1998 and October 2000, PERS

[2] Government Code section 21157 provides: "The governing body of a contracting agency shall make its determination within six months of the date of the receipt by the contracting agency of the request by the board pursuant to Section 21154 for a

notified Visalia at least seven times that it was in violation of section 21157 for failing to make a determination with respect to Sepulveda-Huth's eligibility for disability retirement within six months of receiving a request from the PERS board that it do so.

In September of 2001, Sepulveda-Huth petitioned the Tulare County Superior Court for a writ of mandate to require Visalia to determine her eligibility for retirement. (Code Civ. Proc, § 1094.5.) At the same time, Sepulveda-Huth filed a claim for increased benefits with the WCAB, alleging Visalia had failed to process her disability retirement claim in a timely manner *because* she had filed a workers' compensation claim, in violation of section 132a.

In December of 2001, before Sepulveda-Huth's writ was heard, Visalia denied Sepulveda-Huth's request for disability retirement.

On February 20, 2004, Sepulveda-Huth and Visalia entered into a settlement agreement with respect to Sepulveda-Huth's stress-related workers' compensation claim, settling the claim for $25,000 plus attorneys' fees. The agreement expressly excluded Sepulveda-Huth's pending claim under section 132a.

On February 29, 2004, the workers' compensation administrative law judge issued a decision on Sepulveda-Huth's section 132a claim, concluding she was not entitled to increased benefits under section 132a because "there was no current employment relationship at the time that the alleged discriminatory acts took place … " and "[t]herefore, given that there was no current employment relationship at the time that the alleged discriminatory acts took place, the applicant does not have a cause of action under Labor Code section 132a and she is not entitled to receive any increased benefits in this matter."

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determination with respect to a local safety member. [¶] A local safety member may waive the requirements of this section."

Sepulveda-Huth timely petitioned the WCAB for reconsideration. The WCJ maintained the position that Sepulveda-Huth's claims of discrimination were not actionable under section 132a because her employment had been severed with Visalia for several years before the allegedly discriminatory acts took place.

On May 13, 2004, the WCAB denied Sepulveda-Huth's petition for reconsideration.

DISCUSSION

As set forth above, approximately two years after leaving her employment with Visalia Sepulveda-Huth filed a workers' compensation claim for alleged injuries to her psyche that occurred during the course of her employment. Visalia and Sepulveda-Huth ultimately settled Sepulveda-Huth's general workers' compensation claim. However, Sepulveda-Huth also claims she is entitled to "increased benefits" under section 132a because Visalia discriminated against her (by not rendering a decision on her disability retirement claim in a timely manner) in retaliation for her filing the workers' compensation claim.

Section 132a provides, in pertinent part:

> "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. [¶] (1) Any employer who ... in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

At least two cases have addressed the question of who will be considered "employees" within the meaning of section 132a.[3] In *City of Anaheim v. Workers' Comp. Appeals Bd.* (1981) 124 Cal.App.3d 609 (*City of Anaheim*), the court declined to apply the provisions of section 132a to the admittedly discriminatory conduct of an employer occurring *after* the applicant had left the city's employment. The city had made disparaging remarks to the applicant's subsequent employer related to the applicant's pending claim, and this conduct became the object of a section 132a claim. The court explained:

> "The language of section 132a makes clear that what is prohibited is the discharge or threatened discharge of or any other manner of discrimination against an employee by his or her employer on account of the employee's having indicated an intention to file or having filed an application with the Board or on account of the employee's having received a rating, award, or settlement. The statute repeatedly and consistently refers to the 'employer' and the employee." (*Id.* at p. 614.)

The *City of Anaheim* court found the statutory language to be unambiguous, and expressly rejected the argument that the declared statutory purpose and general policy considerations mandated a different result. Instead, the court concluded, "Clearly the statute contemplates an employer-employee relationship *at the time of the discharge, threat of discharge or other discriminatory act*." (*Ibid;* italics added.)

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[3] "Employee" is not a defined term in section 132a. However, it is defined in Division 4, Chapter 2, Article 2, section 3351, another part of the Labor Code covering workers' compensation, and states, in pertinent part: "'Employee' means every person *in the service of an employer* under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes …." (Italics added.) Webster's defines employee as: "one employed by another … " with "employ" defined as, "to use or engage the services of" or "to provide with a job that pays wages or salary." (Webster's Tenth Collegiate Dict. (1996) p. 379.)

Three years later, in *Morehouse v. Workers' Comp. Appeals Bd*. (1984) 154 Cal.App.3d 323, Division Five of the Second Appellate District faced a similar question. In *Morehouse*, the petitioner received an industrial injury while working for Goodyear Tire & Rubber Company (Goodyear), where he had worked for 33 years. The workers' compensation claim was ultimately settled, and Morehouse was laid off during a plant closure approximately two years later. Morehouse was subject to recall if the plant reopened and received periodic unemployment benefits from Goodyear. A Goodyear foreman then offered to reemploy Morehouse, but the offer was retracted by a senior manager because of Morehouse's previous workers' compensation claim and union activities. (*Id*. at pp. 326-327.) Morehouse filed a claim alleging discrimination in violation of section 132a, but the WCJ concluded he was not entitled to a section 132a award because he was not an employee under the reasoning in *City of Anaheim*. The Second District ultimately reversed that conclusion, distinguishing *City of Anaheim*. In doing so, the *Morehouse* court recognized the narrow scope of its holding:

> "Section 132a applies to '*Any* employer who discharges, or threatens to discharge, or *in any manner discriminates* against *any* employee ....' (Italics added.) Here, Goodyear's discriminatory act occurred in the process of reemploying someone who had worked for them for 33 years, who at that time was on 'laid off' status, was subject to recall by Goodyear, was receiving supplemental unemployment benefits from Goodyear, remained in contact with Goodyear regarding reemployment, was not employed elsewhere, and was qualified for the open position. In light of these circumstances and recognizing that section 132a must be liberally construed to protect the injured worker, we find that Morehouse was an employee within the meaning of section 132a when the discriminatory act occurred." (*Morehouse v. Workers' Comp. Appeals Bd*., *supra*, 154 Cal.App.3d at p. 329.)

Petitioner maintains that her case is akin to *Morehouse* and that *City of Anaheim* is distinguishable. To the contrary, we find this case to lack the distinguishing factors of *Morehouse* and agree with the decision reached in *City of Anaheim*. The petitioner in Morehouse maintained a status of employment (albeit "laid off" status), was currently

subject to recall, and *currently receiving wages* from the employer. Here the only post-employment tie Sepulveda-Huth maintained with Visalia was ongoing litigation and a pending claim for retirement benefits. We do not believe this makes her an employee under any common understanding of that word.

The statute as a whole supports this interpretation. In addition to the obvious semantic appeal of a conclusion that "employee" does not mean "former employee," the fundamental differences between current employees and former employees are dramatic and justify refusing to expand the protections of section 132a. Current employees have a need for protection under section 132a in order to be shielded from adverse behavior by their employer while – at the same time – engaging in an often adversarial relationship in their claim for workers' compensation benefits. This need is significantly reduced or nonexistent for a former employee. Thus, where a lawful separation from employment has occurred, the most important reasons for protecting the *now former* employee from the discrimination outlined in section 132a have been eliminated, and the remedies provided for any alleged discrimination are in large part inapplicable.[4]

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[4] Petitioner does not, and could not, contend that the reason for her separation from employment was somehow related to her pending workers' compensation claim since she never made a claim related to an industrial injury until more than two years after leaving her position with Visalia. Thus, our position is consistent with the holding in *Barnes v. Workers Compensation Appeals Board* (1989) 216 Cal.App.3d 524, 539 (*Barnes*). In *Barnes* the court concluded section 132a applies to cover employees who only become former employees because of the employer's discriminatory behavior related to the industrial injury. The court stated, "The critical distinction between *City of Anaheim* and the present case is that the employment relationship there had been unequivocally and lawfully terminated before any of the allegedly discriminatory acts took place." (*Barnes*, *supra*, 216 Cal.App.3d at p. 539.) Here, for purposes of her workers' compensation claim, Sepulveda-Huth did not dispute the voluntary nature of her resignation but merely contended her resignation letter was not entirely truthful.

The language used in section 132a is consistent with this reading of the statute. The intent of protecting *current* employees who are in the process of maintaining an action for workers' compensation benefits against their employer is indicated not only by the repeated and consistent use of the words "employee" and "employer" throughout, but also by the bulk of the remedies provided, with the employee "entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer." As stated by the court in *City of Anaheim*, "The principal remedies provided by the statute, aside from the serious and willful penalty, are reinstatement and recovery of lost wages and employee benefits, necessarily implying an employer-employee relationship at the time of discharge or other act of discrimination.... Clearly the statute contemplates an employer-employee relationship at the time of the discharge, threat of discharge or other discriminatory act." (*Id*. at p. 614.)

Petitioner nevertheless argues that the stated goal of section 132a – "that there should not be discrimination against workers who are injured in the course and scope of their employment" – is best served by concluding section 132a applies to claims of discrimination by former employees. Our dissenting colleague agrees, contending this interpretation of the statute is justified because we are to liberally construe section 132a to protect persons injured in the course of their employment. (See *Judson Steele Corp. v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 658, 668.) In our view, reading the word "employee" to mean "former employee" would constitute *re*-construction of the statute, which we are of course prohibited from doing. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827; *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381.) Moreover, such an expansive interpretation of section 132a is more insidious than it might appear at first glance. For example, if former employees are entitled to the protections and remedies of the statute so long as they maintain a "continuing economic relationship" with the employer, any time an employer refuses to settle pending litigation

based on the past employment relationship the employer could be exposed to additional litigation under section 132a. This is undoubtedly not the intent of the statute.

Accordingly, we conclude former employees are not employees for purposes of section 132a. Current employees are well protected by section 132a, and former employees have other remedies available to them.[5] "[W]hether or not the statute ought to be amended to extend to a situation like that in the case at bench is a question for the Legislature not the courts." (*City of Anaheim*, *supra*, 124 Cal.App.3d at p. 616.)

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[5] Generally, the disability retirement application would be filed with PERS, it would be referred to Visalia for a disability determination and the determination would be made within six months. (Gov. Code, § 21157) The local safety member would then have the right to appeal an adverse decision in accordance with the Administrative Procedure Act (Gov. Code, § 11500 et seq.). Visalia's failure to do so here required Sepulveda-Huth to initiate writ proceedings to receive a determination from Visalia, but she remained at all times entitled to appeal that decision and to avail herself of the remedies available through the Administrative Procedures Act or other civil remedies available for Visalia's interference with her right to retirement benefits, if any.

DISPOSITION

The decision of the WCAB is affirmed.

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Ardaiz, P. J.

I CONCUR:

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Harris, J.

WISEMAN, J.

I respectfully dissent. In my opinion, Sepulveda-Huth's voluntary resignation does not shield Visalia from potential liability for discrimination where Visalia withheld a fundamental benefit arising out of the employment relationship. If it had not been for Visalia's discriminatory behavior in failing to process Sepulveda-Huth's retirement disability benefits, there would be no basis for a 132a claim. Hence, we would not be having this discussion.

Labor Code section 132a applies to "[*a*]*ny employer* who … in *any manner* discriminates against *any employee* because he or she has filed … a claim for compensation …." (Italics added.) The majority places great emphasis on the fact that section 132a does not specifically state, "any current or former employer who … discriminates against any current or former employee," concluding that this omission means that the Legislature only intended to include current employment relationships. I do not agree with this reading of section 132a, and instead would hold that the terms "any employer" and "any employee" embraces employees such as Sepulveda-Huth and prohibits the conduct of employers like Visalia. If the Legislature had intended to exclude employees in Sepulveda-Huth's position, it would not have used the term "any" in describing what employers and employees are within section 132a's umbrella.

Morehouse v. Workers' Comp. Appeals Bd. (1984) 154 Cal.App.3d 323 (*Morehouse*) supports this interpretation of section 132a. As the majority opinion accurately describes, *Morehouse* examined whether the applicant was an "employee" within the meaning of section 132a. (*Morehouse, supra,* 154 Cal.App.3d at p. 328.) The court observed that the statute applies to "'[*a*]*ny* employer who discharges, or threatens to discharge, or *in any manner discriminates* against *any* employee ….'" (*Id.* at p. 329.) *Morehouse* concluded that, in light of the obligation to liberally construe section 132a for the purpose of extending benefits for the protection of injured workers, coupled with the

applicant's "laid off" status subject to recall and receipt of Goodyear's unemployment payments, the applicant remained an "employee" within the meaning of section 132a when Goodyear refused to rehire him. (*Morehouse, supra,* at p. 329.) In a footnote, the court concluded that *City of Anaheim v. Workers' Comp. Appeals Bd.* (1981) 124 Cal.App.3d 609, relied upon here as persuasive authority by the majority, was inapposite. In doing so, *Morehouse* reasoned that *City of Anaheim* was not relevant because there the applicant did not suffer any economic loss or adverse consequence from the employer's discriminatory conduct.

I recognize that, unlike in *Morehouse,* Sepulveda-Huth terminated her employment with Visalia and did not remain in any type of employment relationship at the time she filed her claim under section 132a. In my opinion, that factor does not carry the day for Visalia in light of the strong policy favoring a worker's right to be free from discrimination.

Here, there is no real question that Sepulveda-Huth's alleged injury occurred during the course and scope of her employment with Visalia. There is also no dispute that Visalia did not comply with Government Code section 21157 in that it failed to determine Sepulveda-Huth's eligibility for disability retirement within six months of filing her application. In fact, the California Public Employees Retirement System repeatedly (seven times, to be exact) notified Visalia that it was in violation of the law by failing to process her application. It was only then that Sepulveda-Huth asked the WCAB for increased benefits under section 132a alleging that Visalia discriminated against her by not processing her retirement disability application because she had filed a workers' compensation claim. If Visalia merely had complied with the law and its own procedure, there would have been no basis for a section 132a claim.

As an intermediate appellate court, we must apply our Supreme Court's mandate to liberally construe all workers' compensation laws, including section 132a for the purpose of extending benefits to injured workers. (*Judson Steele Corp. v. Workers'*

Comp. Appeals Bd. (1978) 22 Cal.3d 658, 668.) I agree with *Morehouse* that the WCAB and courts must look beyond a direct employer-employee relationship at the time of the alleged discrimination in determining whether the employer's conduct potentially falls within the ambit of section 132a. As in *Morehouse,* the discriminatory conduct in dispute here involves a single employer with a continuing economic relationship with a former employee. Sepulveda-Huth correctly observes that this is not a case where she and Visalia have "gone their separate ways without any significant ties between them at the time the discriminatory conduct took place."

In my opinion, a former employee such as Sepulveda-Huth is an "employee" for purposes of section 132a discrimination throughout the period that Visalia delayed in determining her retirement eligibility. Consequently, she should be able to pursue her discrimination claim under section 132a.[1]

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Wiseman, J.

[1]It is irrelevant that other remedies are available to Sepulveda-Huth as that is true in most, if not all claims made pursuant to section 132a.